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Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ADELAIDE C. GRISWOLD, *et al.*,

Petitioners,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Does Treasury Regulation § 25.2511-1(c), which states that transfers of property will not be considered taxable gifts if disclaimers of any interest in such property are "made within a reasonable time after knowledge of the existence of the transfer," permit the imposition of a gift tax upon a disclaimant who lacks actual knowledge that any property interest has been transferred to him?

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ADELAIDE C. GRISWOLD, *et al.*,

Petitioners,

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners Adelaide C. Griswold, James R. Houghton, May K. Houghton, Amory Houghton, Jr. and Ruth W. Houghton respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 8, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is attached hereto as Appendix pages A-1 through A-3. The opinion of the United States Tax Court is reported at 81 T.C. 141 (1983), and is attached hereto as Appendix pages A-4 through A-21.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was rendered and entered on January 8, 1987. On March 26, 1987, The Honorable Thurgood Marshall, Associate Justice of the Supreme Court and Circuit Justice, signed an order extending Petitioners' time to file a petition for certiorari in this Court to and including May 7, 1987. On April 28, 1987, Justice Marshall signed a second order extending Petitioners' time to file a petition for certiorari to and including June 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

26 U.S.C. § 2501. *Imposition of Tax*

(a) TAXABLE TRANSFERS.—

(1) GENERAL RULE.—A tax, computed as provided in section 2502, is hereby imposed for each calendar quarter on the transfer of property by gift during such calendar quarter by any individual, resident or nonresident.[1]

26 U.S.C. § 2511. *Transfers in General.*

(a) SCOPE—Subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

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1 This was amended in 1981 by Pub. L. No. 97-34, 95 Stat. 320, and now provides for the imposition of a gift tax on a yearly, rather than a quarterly basis.

Treasury Regulation § 25.2511-1(c), 26 C.F.R. § 25.2511-1(c):

> (c) The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further § 25.2512-8. Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable [sic] and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. . . .

INTRODUCTION

As discussed in the statement of facts, the issue in this case involves the application of Treas. Reg. § 25.2511-1(c) to a family trust created by Alanson B. Houghton. The terms of this trust, *inter alia*, gave to his grandchildren who were living at the time of his death a contingent remainder interest in the corpus of the trust. Three of Alanson Houghton's grandchildren are the Petitioners in this action and a fourth, Eleanor C. Hallenbeck, is currently appealing an adverse decision by the Tax Court on the same issue to the United States Court of Appeals for the Eleventh Circuit, No. 86-3580.

The claims of Petitioners and Hallenbeck derive from nearly identical facts, involve the same trust instrument, and the same treasury regulation. The Eleventh Circuit has recently determined that it will hear oral argument in *Hallenbeck* during the week of June 29, 1987. The possibility of this Court granting Petitioners' request for certiorari would be enhanced greatly if the Eleventh Circuit were to reverse the Tax Court in *Hallenbeck* and thereby reach a result that directly conflicts with the Second Circuit's decision in this action. If such a conflict develops, it would lead to the inequitable result of members of the same family having disparate tax treatment regarding their disclaimers of the same trust, simply because they reside in different jurisdictions. Therefore, Petitioners respectfully request that this Court defer determining whether to grant their request for certiorari until after this Court reconvenes in the autumn. By that time, the Eleventh Circuit will probably have decided *Hallenbeck*.

STATEMENT OF THE CASE

1. Statement of Facts

The testator, Alanson B. Houghton, died on September 16, 1941, leaving a will which established ten trusts, one for the primary benefit of his daughter Elisabeth Houghton (here-

inafter "Elisabeth's Trust") and one for the primary benefit of each of his nine surviving grandchildren, including the Petitioners.[2] (A-6—A-7)

Petitioners were made contingent remaindermen under the terms of Elisabeth's Trust. Upon Elisabeth's death, Petitioners each became entitled to a one-eighth income interest in the trust and had a right to receive at least a one-eighth interest in the corpus if he survived the measuring life. (A-7—A-8)

Accounting proceedings were held in state court in 1957 with respect to all trusts in question, and as a part of those proceedings citations for each of ten trusts, were served on Petitioners. (A-9—A-10) Each citation was addressed to Petitioners and approximately thirty-five other individuals and merely included the name of the income beneficiary. One such citation included the name of Elisabeth Houghton. (A-9)

Elisabeth Houghton died on March 2, 1974. (A-10) Petitioners Adelaide C. Griswold, Amory Houghton, Jr., and James Houghton executed disclaimers of their entire interests in Elisabeth's Trust on May 15, 1974, June 6, 1974, and June 7, 1974, respectively. It is undisputed that these disclaimers were unequivocal and effective under state law. (A-11)

The Internal Revenue Service (the "Service") assessed deficiencies in federal gift taxes for the calendar quarter ended June 20, 1974, asserting that the disclaimers were taxable transfers. (A-11)

2. Proceedings Below

On September 9, 1979, Petitioners filed a petition in the United States Tax Court for the redetermination of the deficiencies assessed by the Service. Jurisdiction in the Tax Court existed pursuant to 26 U.S.C. § 7442 and § 6213. In the Tax

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2 May K. Houghton and Ruth W. Houghton are the wives of James R. Houghton and Amory Houghton, Jr., respectfully. They are included as named Petitioners only because each of them consented to any gifts made by her husband during the year considered (1974) for federal gift tax purposes as having been made one-half by her. Hereinafter, unless the context otherwise requires, all references to the "Petitioners" are to Adelaide C. Griswold, Amory Houghton, Jr. and James R. Houghton.

Court, Petitioners alleged the Notices of Deficiency erroneously determined that the disclaimers were taxable transfers for federal gift tax purposes.

On August 23, 1983, the Tax Court filed an opinion (A-4) ruling that Petitioners' disclaimers were taxable transfers for federal gift tax purposes because they were not timely under Treasury Regulation § 25.2511-1(c) ("the Regulation"). The Tax Court held the Regulation's provision that disclaimers be made within a "reasonable time" after the taxpayer first acquires "knowledge of the existence of the transfer," required Petitioners to have disclaimed their contingent remainder interests in 1957 (after the service of the citations) rather than upon the death of the income beneficiary, Elisabeth Houghton in 1974 as they did. (A-17)

On August 15, 1986, Petitioners filed their Notice of Appeal to the Court of Appeals for the Second Circuit.

In an Opinion filed on January 8, 1987, the Court of Appeals for the Second Circuit affirmed the decision of the Tax Court. (A-1) The Second Circuit held that knowledge of the transfer had been acquired by Petitioners in 1957, seventeen years prior to the death of the income beneficiary, rather than in 1974, when Petitioners became entitled to a one-eighth share of income interest (but not the corpus). (A-2—A-3)

On March 24, 1987, Petitioners filed a request for an extension of time in which to file a petition for certiorari in this Court. On March 26, 1987, Associate Justice Thurgood Marshall, Circuit Justice for the Second Circuit, signed an order extending Petitioners' time to file a petition for certiorari in this Court to and including May 7, 1987. On April 28, 1987, Justice Marshall signed a second order extending Petitioners' time to file a petition for certiorari to and including June 1, 1987.

Reasons for Granting the Writ

I. THE SECOND CIRCUIT'S DECISION IS ANOMALOUS AND INEQUITABLE BECAUSE IT IMPOSES LIABILITY ON PETITIONERS FOR GIFT TAXES WHERE THEY DID NOT HAVE ACTUAL KNOWLEDGE THAT TRUST INTERESTS HAD BEEN TRANSFERRED TO THEM.

Treasury Regulation § 25.2511-1(c) provides that a disclaimer will not result in a taxable transfer if made within a reasonable time after the disclaimant first acquires "knowledge of the existence of the transfer." The central issue in this case involves how "knowledge" should be defined for the purposes of the Regulation. The Regulation does not define "knowledge," nor does any other statute, regulation or legislative history. Amory Houghton, Jr. and James Houghton have asserted throughout this action that they had actual knowledge of their interests in Elisabeth's Trust only shortly after her death, and in the case of Adelaide C. Griswold, only shortly before her death. Upon acquiring this knowledge, they all promptly disclaimed their interests *in toto*. The Service contends that these disclaimers were not timely because the citations served seventeen years earlier (in 1957) on Petitioners provided them with reason to know of their interests in Elisabeth's Trust. Therefore, the running of the reasonable time limitation period purportedly started in 1957.

As applied to Petitioners by the Service, the Tax Court and the Second Circuit, the Regulation has been construed to require only constructive knowledge on the part of the taxpayer confronted with the decision of whether of not to disclaim a gift. The mere articulation of the issue underscores the anomaly of the result reached by the Second Circuit: If a taxpayer does not have actual knowledge that a trust interest subject to complete divestiture has been transferred to him, how can he possibly decide to disclaim that interest in order to avoid imposition of the gift tax? However, the decision of the Second Circuit in effect requires this of Petitioners. The decision is not only illogical, but is blatantly inequitable. Petitioners should not be required to pay these taxes where

they have never enjoyed any of the income generated by the trust.[3]

For taxpayers who are subject to the Regulation,[4] such as Petitioners, the importance of the issue presented for review—whether the Regulation requires actual or constructive knowledge—is staggering. It is the difference between being liable for a gift tax on property which Petitioners have never possessed, controlled, enjoyed or benefited from, as the Second Circuit requires, (and which is, because of the valid disclaimer, not available to them for the payment of tax) and paying no tax.

II. THE SECOND CIRCUIT'S OPINION CONFLICTS WITH ESTABLISHED RULES OF CONSTRUCTION.

A. The Reasoning of the Second Circuit and Tax Court Cannot Be Reconciled With the Form and Content Of The Regulation.

In the proceedings below the Tax Court stated:

> While their [disclaimers] were unequivocal and effective under New York Law, petitioners should not be able to circumvent the gift tax when it is clear that Adelaide, Amory, Jr., and James were *served notice* during 1957 that they had an interest in Elisabeth's Trust and did not disclaim their interests therein until 17 years later.

A-20 (emphasis supplied).

The Tax Court's choice of words is revealing. The phrase "served notice," together with the conclusion reached, demonstrate that the court actually implemented a presumption. It does not necessarily follow that receipt of the citations consti-

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3 The Tax Court noted: "[A]delaide, Amory, Jr., and James have never received any income or principal from Elisabeth's Trust. . . ." (A-13)

4 The Regulation was superseded by the Tax Reform Act of 1976, Pub. L. No. 94-455, § 2518, 90 Stat. 1520, 1893. However, the Regulation still applies to interests created prior to December 31, 1976. For further discussion of this, *see* Part III, *infra*.

tutes actual knowledge of their contents. The Second Circuit adopted this conclusion. (A-2)

However, the Regulation does not utilize a presumption, which in the proper case *would* authorize a court to infer that certain acts (*e.g.*, the service of citations) provided a taxpayer with actual knowledge that a trust interest had been transferred to him. Where the Regulation intends a presumption, it explicitly outlines one. For example, the Regulation states: "In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be *presumed* to have accepted the property." (emphasis supplied). This is the only presumption used in Treasury Regulation § 25.2511-1(c)—there is no similar provision regarding the interpretation of "knowledge." Therefore, the decisions of the Tax Court and the Second Circuit conflict with the language and structure of the Regulation itself. This Court should rule on which is the correct application of the Regulation in order to avoid any further uncertainty in federal gift tax law, and in order to perempt the possibility of a nonuniform application of federal gift tax law.

B. The Second Circuit Decision Contravenes Rules Established By This Court For The Construction Of Revenue Statutes.

This Court ruled in *De Ganay v. Lederer*, 250 U.S. 376, 381 (1919), that words which are not defined in the tax code are "presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them." The result reached by the Second Circuit in this case indicates that it did not apply the term "knowledge" as it is used in its "ordinary and usual sense." *DeGanay*, 250 U.S. at 381. Webster's New International Dictionary, Third Edition, Unabridged (1968) defines "knowledge" as "the fact or condition of apprehending truth, fact or reality immediately with the mind or senses."

De Ganay and other sources[5] indicate that "knowledge" for the purposes of the Regulation means the actual possession of information about the existence of the trust interest to enable the donee to decide whether to disclaim the property or accept it. The Second Circuit's ruling that the "reasonable time" limitation period began in 1957 despite Petitioners' repeated assertions that they knew of the remainder interests seventeen years later, demonstrates that it did not adopt the ordinary meaning of the term knowledge. In so doing, the Second Circuit ignored the applicable rule of construction announced by this Court in *De Ganay*. This Court should act to prevent such an unnecessary conflict by ruling on precisely what constitutes knowledge for the purposes of the Regulation.

C. The Second Circuit Decision Would Impermissibly Expand The Scope Of The Regulation By Implication.

In *Gould v. Gould*, 245 U.S. 151, 153 (1917), this Court ruled:

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen.

By imputing knowledge to Petitioners, the Tax Court and the Second Circuit have violated the mandate of this Court. Both courts have impermissibly expanded the scope of the Regulation by implication beyond the clear import of the language used.

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5 *See, e.g., Curtis v. Commissioner*, 3 T.C. 648 (1944) ("The language of the revenue act, generally speaking is to be given its ordinary and natural meaning."); *see also Cozier v. American Airlines*, 25 F.R.D. 268, 269 (S.D.N.Y. 1960) (knowledge is "the act or state of understanding"); U.C.C. § 1-201(25) ("A person knows or has knowledge of a fact when he has actual knowledge of it.").

A revenue statute is, of course, enacted by duly elected Congressional representatives who are directly accountable to their constituencies. By contrast, a treasury regulation is promulgated by an executive appointee, who at most is only indirectly accountable to the taxpaying public.[6] Therefore, the reasoning of *Gould* should apply *a fortiori* where the interpretation of a treasury regulation is at issue, rather than a taxing statute. However, both the Second Circuit and the Tax Court failed to consult *Gould* and as a result the conclusion they reached is erroneous.

This Court should act to prevent such a fundamentally unfair extension of the Regulation. Of equal importance though, is the impact of the Tax Court and Second Circuit opinions on the taxpaying public. Taxpayers are entitled to feel confident that *Gould* is in fact the standard by which revenue statutes and regulations are to be interpreted. Re-affirmance of the proper standard by this Court is particularly critical at this time because of the extensive changes made by Congress in the Internal Revenue Code in 1986. The decisions of the Tax Court and Second Circuit compound the uncertainty brought on by the recent amendments to the tax code, for taxpayers as well as tax practitioners.

III. If the Meaning of the Regulation Is Not Clarified, the Volume of Tax Litigation Will Increase and Uncertainty Over the Federal Gift Tax Law Will Continue.

The Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, 1893 amended the Internal Revenue Code to include a new provision dealing specifically with the timeliness of disclaimers, section 2518. However, section 2518 is effective only as to interests created after December 31, 1976.[7] At present, Petitioners know of a number of cases pending in the Tax

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6 26 U.S.C. § 7805 authorizes the Secretary of the Treasury "or his delegate" to prescribe necessary revenue regulations.

7 *See* Pub. L. No. 94-455, § 2009(e)(2), 90 Stat. 1520, 1896.

tioners know of a number of cases pending in the Tax Court[8] and United States Claims Court[9] on this issue and one pending in the United States Court of Appeals for the Eleventh Circuit.[10]

Since the Regulation applies to all trust interests created prior to 1977, the number of disclaimants or potential disclaimants awaiting clarification on the meaning of the Regulation is limited only by the number of individuals throughout the United States who were made contingent remaindermen under trust instruments before 1977. Petitioners respectfully request that this Court rule on what constitutes knowledge for the purposes of the Regulation, in order to eliminate the confusion and disharmony created by the decisions of the Tax Court and the Second Circuit.

IV. INTERPRETING THE REGULATION TO REQUIRE ACTUAL KNOWLEDGE IS THE LOGICAL EXTENSION OF THIS COURT'S DECISION IN *JEWETT V. COMMISSIONER.*

In *Jewett v. Commissioner*, 455 U.S. 302 (1982), this Court held that the term "transfer" in the Regulation referred to the creation of a trust interest rather than its vesting. The following passage illustrates that defining "knowledge" as actual knowledge is the logical outgrowth of *Jewett*:

> The petitioner possessed, for 24 years, the effective right to determine who should ultimately receive the benefits of a 50-percent remainder interest of a trust which, in 1972, had a corpus of approximately $8 million. He *waited to act* in respect of that remainder interest until the surviving life beneficiary was over 70 years of age and until he himself was 45 and, it appears, a man of substantial means. In 1982, by the execution of two disclaimers, he *elected to let the property pass* according to the

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8 *Estate of Eleanor H. Cole v. Commissioner*, T.C. Docket No. 12891-79; *Beer v. Commissioner*, T.C. Docket No. 12877-79.

9 *Estate of Amory Houghton v. United States*, No. 233-83T.

10 *Hallenbeck v. Commissioner*, No. 86-3580.

> alternative provisions of his grandmother's will—to the natural objects of his bounty. This, we hold, was an exercise of control over the disposition of property subject to the gift tax imposed by section 2501. 70 T.C. 430, 438 (1978) (footnote omitted).

455 U.S. at 318-19 (emphasis supplied).

In order to "wait to act" and to "elect to let the property pass," a person must have actual information that some thing has been tranferred to him. To "wait" or to "elect" requires making a decision. In the absence of information with which to make a decision, a person cannot be said to have waited or to have elected and accordingly cannot be said to have controlled the assets involved. The knowledge required clearly must be actual knowledge if actual control is to result; constructive or imputed knowledge does not enable a person to exercise actual control.

This Court's analysis in *Jewett* of the term "transfer" in the Regulation as referring to future interests is also rooted in an assumption about the meaning of "knowledge." In its demonstration that "transfer" encompassed more than an actual distribution, this Court described the knowledge requirement in the following terms:

> The Regulation also requires "knowledge of the existence of the transfer", since a person to whom assets have actually been distributed would seldom, if ever, lack knowledge of the existence of such a transfer, it seems more likely that this provision was drafted to protect persons who had no knowledge of the creation of an interest.

455 U.S. at 312.

No protection is afforded, if knowledge of the existence of the interest is imputed to the tranferee, because then the transferee lacks information upon which to act. In order for the knowledge requirement to afford the protection expected in *Jewett*, "knowledge of the existence of the transfer" must be construed to require that the transferee has such information.

In short, the reasoning of *Jewett* demands that "knowledge" be construed as actual knowledge. Petitioners did not have "knowledge" of their interests in Elisabeth's Trust as required by the Regulation and in the sense the term was used by this Court in *Jewett*. This Court should extend *Jewett* to address the facts of this case by defining "knowledge" and eliminate further uncertainty over the interpretation of the Regulation.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 8, 1987.

Dated: June 1, 1987

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 86-4111, 86-4113, 86-4121

FILED JAN 8 1987, Elaine B. Goldsmith, *Clerk*

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of January one thousand nine hundred and eighty-seven.

Present:

HONORABLE WILLIAM H. TIMBERS,
HONORABLE THOMAS J. MESKILL,
HONORABLE AMALYA L. KEARSE,
Circuit Judges.

ADELAIDE C. GRISWOLD, JAMES R. HOUGHTON, MAY K. HOUGHTON, AMORY HOUGHTON, JR., RUTH W. HOUGHTON,
Petitioners,

—v.—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petitioners Adelaide C. Griswold, *et al.*, appeal from a decision of the United States Tax Court, Wiles, *J.*, determining that petitioners were liable for federal gift tax in connection with their disclaimer in 1974 of interests in trusts created by their grandfather in 1941.

This cause came on to be heard on the transcript of the record from the United States Tax Court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decision of the United States Tax Court be, and it hereby is affirmed, substantially for the reasons stated in the opinion of Judge Wiles, filed August 23, 1983.

The Tax Court found that petitioners learned of their interests in the trusts at least as early as 1957, and that their disclaimers in 1974 constituted gifts because they were not "made within a reasonable time after knowledge of the existence of the transfer" of the trust interests to them, as required by 26 C.F.R. § 25.2511-1(c). On appeal, petitioners contend principally that the Tax Court erred because it imposed liability on them solely on the basis of constructive knowledge imputed to them by the court rather than actual knowledge as required by § 25.2511-1(c). Finding no merit in any of petitioners' contentions, we affirm.

It is undisputed that in 1957, state court proceedings were held with respect to the trusts in question, and citations were served by the trustees on all persons having interests in those trusts, including petitioners. The Tax Court found as a fact that petitioners had knowledge in 1957, from reading the citations served on them, that interests in the trusts had been transferred to them. Implicit in this was the finding that the citations were sufficient to inform petitioners that they in fact had interests in the trusts. In light of (1) petitioner Griswold's testimony that if she read the citations she would have realized that she and her children had interests in the trusts, and (2) petitioners' counsel's argument to the Tax Court that the citations revealed "a contingent interest in income and remainder" (but that that information was simply insufficient because it did not reveal the extent and nature of the trust assets), we cannot say that the Tax Court's implicit finding that the 1957 citations were sufficient to inform petitioners that they had interests in the trusts was clearly erroneous.

Nor can we find error in the Tax Court's conclusion that petitioners had not sustained their burden of proving that they had not read the citations in 1957. None of the petitioners

denied having received or read the citations; they simply said they did not remember having read them.

Finally, we see no error in the Tax Court's interpretation of § 25.2511-1(c) as requiring that any disclaimer, in order not to constitute the making of a gift, be made within a reasonable time of the disclaimant's knowledge of the existence of the transfer even if the value of the interest was not then known. There being no clear error in the Tax Court's findings as to petitioners' actual knowledge in 1957 that they had interests in the trusts, there is no basis for overturning its conclusion that the 1974 disclaimers were not made within a reasonable time.

We have considered all of petitioners' arguments on this appeal and have found them to be without merit.

The decision of the Tax Court is affirmed.

/s/ WILLIAM H. TIMBERS
William H. Timbers, U.S.C.J.

/s/ THOMAS J. MESKILL
Thomas J. Meskill, U.S.C.J.

/s/ AMALYA L. KEARSE
Amalya L. Kearse, U.S.C.J.

N.B. *Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported cited or otherwise used in unrellated cases before this court or any other court.*

[*reported at 81 United States Tax Court Reports 141*]

ADELAIDE C. GRISWOLD, ET AL.,[1] PETITIONERS *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Nos. 12876-79, 12878-79, 12880-79

Filed August 23, 1983

A, A Jr., and J held contingent interests in a testamentary trust created in 1941 by the will of their grandfather, Alanson B. Houghton. The trust provided Alanson B. Houghton's daughter, Elisabeth Houghton, with an income interest for life and, if Elisabeth died without living issue, then certain grandchildren of Alanson B. Houghton, subject to certain additional contingencies, would share the remainder interest. During March of 1957, the two trustees of the trust petitioned the Surrogate's Court of the State of New York for a judicial settlement of the first intermediate accounting for such trust. On Apr. 4, 1957, the Surrogate's Court issued a citation to all persons having an interest in the trust. A, A Jr., and J were each personally served a copy of such citation during 1957, when they were at least 21 years of age. The citation clearly listed the names of each family member having an interest in the trust, including the names of A, A Jr., and J, and clearly stated that each such person had an interest in "a trust for the benefit of Elisabeth Houghton under Article Nineteenth, Paragraph 1 of the Last Will and Testament of Alanson B. Houghton." Elisabeth Houghton died without living issue on Mar. 2, 1974. A, A Jr., and J disclaimed their interests in the trust shortly after Elisabeth's death. The disclaimers were unequivocal and effective under New York law. *Held*:

1. The "transfer" within the meaning of sec. 25.2511-1(c), Gift Tax Regs., occurred in 1941, when A, A Jr., and

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1 Cases of the following petitioners are consolidated herewith: James R. Houghton and May K. Houghton, docket No. 12878-79; and Armory Houghton, Jr., and Ruth W. Houghton, docket No. 12880-79.

J each received a contingent remainder from their deceased grandfather's estate;

2. A, A Jr., and J had "knowledge of the existence of the transfer" within the meaning of sec. 25.2511-1(c), Gift Tax Regs., when they were personally served with the citations concerning the trust during 1957, and, therefore, their respective disclaimers, approximately 17 years later, were not made within a reasonable time as is required under such regulation. *Jewett v. Commissioner*, 455 U.S. 305 (1982), affg. 638 F.2d 93 (9th Cir. 1980), affg. 70 T.C. 430 (1978), followed.

Robert A. Bergquist and *Charles C. Parlin, Jr.*, for the petitioners.

Louis J. Zeller, Jr., for the respondent.

WILES, *Judge*: In these consolidated cases, respondent determined the following deficiencies in petitioners' Federal gift tax:

Petitioner	*Calendar quarter ending*	*Deficiency*
Adelaide C. Griswold ..... (docket No. 12876-79)	June 30, 1974	$271,421.72
James R. Houghton ..... (docket No. 12878-79)	June 30, 1974	262,477.24
May K. Houghton..... (docket No. 12878-79)	June 30, 1974	262,477.24
Amory Houghton, Jr..... (docket No. 12880-79)	June 30, 1974	257,895.36
Ruth W. Houghton ..... (docket No. 12880-79)	June 30, 1974	257,895.36

The only issue presently before us is whether Adelaide C. Griswold, Amory Houghton, Jr., and James R. Houghton made taxable gifts when they executed disclaimers of their respective interests in a testamentary trust.

Findings of Fact

Some of the facts have been stipulated and are found accordingly.

Petitioner Adelaide C. Griswold (hereinafter Adelaide) resided in Buffalo, N.Y., when she filed her petition in this case. She timely filed her Federal gift tax return for the calendar quarter ended June 30, 1974, with the Internal Revenue Service Center, Andover, Mass.

Petitioners James R. Houghton (hereinafter James) and May K. Houghton, husband and wife, and petitioners Amory Houghton, Jr. (hereinafter Amory, Jr.), and Ruth W. Houghton, husband and wife, resided in Corning, N.Y., when they filed their petitions in this case. Petitioners James R. Houghton and Amory Houghton, Jr., timely filed their Federal gift tax returns for the calendar quarter ended June 30, 1974, with the Internal Revenue Service Center, Andover, Mass. Their respective wives, May K. Houghton and Ruth W. Houghton, elected to consent to treat the gifts made by their husbands during the taxable year 1974 as having been made by both husband and wife to the extent allowed by law, and they each (May K. Houghton and Ruth W. Houghton) filed their Federal gift tax returns for the calendar quarter ending June 30, 1974, with the Internal Revenue Service Center, Andover, Mass.

Alanson B. Houghton was born October 10, 1863, and he was the grandfather of Adelaide, Amory, Jr., and James. Alanson B. Houghton had three daughters, Eleanor Wickham, Matilda, and Elisabeth, and two sons, Amory and Quincy Wellington. Adelaide was born on November 19, 1923, and she is the daughter of Eleanor Wickham Houghton. Amory, Jr., and James were born on August 7, 1926, and April 6, 1936, respectively, and they are two of Amory Houghton's five children.

Alanson B. Houghton (hereinafter sometimes referred to as decedent) died testate on September 16, 1941, a resident of Steuben County, N.Y. His last will and testament (hereinafter referred to as the will), dated October 4, 1939, was admitted to probate there on August 27, 1942. Decedent's will established

10 trusts, one of which was for the primary benefit of his daughter Elisabeth (hereinafter such trust will be referred to as Elisabeth's Trust), and the others were for the primary benefit of each of his grandchildren who survived him. Decedent's son, Amory Houghton, and nephew, Arthur A. Houghton, Jr., were named as trustees for each of the trusts created by his will.

Decedent was survived by four of his children, including Amory, Eleanor Wickham, and Elisabeth, and nine grandchildren, including Adelaide, Amory, Jr., and James. Adelaide, Amory, Jr., and James were 17, 15, and 5 years of age, respectively, on the date of decedent's death.[2]

Elisabeth was 32 years of age at the date of decedent's death. Under the terms of Elisabeth's Trust, which is governed by the laws of the State of New York, the income was payable to Elisabeth during her life and, upon her death, the income was payable to her issue then living, per stirpes, or if none, to decedent's (Alanson B. Houghton's) then-living grandchildren (other than Sidney Cole) and to the then-living issue of any deceased grandchild (other than Sidney Cole), one equal part thereof to each such grandchild and one equal part thereof to the issue of each such deceased grandchild to be apportioned among such issue in equal shares per stirpes. The trust further provided that it would terminate upon the death of the youngest of decedent's issue who was living both at the time of decedent's death and Elisabeth's death (i.e., the "measuring life"), with the corpus to be distributed to Elisabeth's then-living issue, or, if none, to decedent's then-living grandchildren (other than Sidney Cole) and to the then-living issue of any deceased grandchild (other than Sidney Cole), one equal part thereof to each such grandchild and one equal part thereof to the issue of each such deceased grandchild, the part so allotted

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2 During 1941 or 1942, Adelaide learned that decedent's will created a trust for her primary benefit; between 1946 and 1950, Amory, Jr., learned that decedent's will created a trust for his primary benefit; and between 1954 and 1957, James learned that decedent's will created a trust for his primary benefit. At the same time that Adelaide, Amory, Jr., and James learned such information, they learned that decedent's will also created similar trusts for the primary benefit of their siblings and cousins.

to the issue of any deceased grandchild to be apportioned among such issue in equal shares per stirpes.

Sometime prior to 1957, various members of the Houghton family formed a corporation known as Houghton Estates for the purpose of supervising the operation of the several trusts which were established for their benefit. Amory Houghton and Arthur A. Houghton, the trustees of Elisabeth's Trust, were associated with Houghton Estates as "trustees."[3]

During March 1957, the trustees of Elisabeth's Trust and the other nine testamentary trusts created by decedent's will petitioned the Surrogate's Court of Steuben County, New York (hereinafter referred to as the Surrogate's Court), for a judicial settlement of their first intermediate accounting, covering the period from October 1, 1945, through December 31, 1954. In their petition with respect to Elisabeth's Trust, the trustees described Adelaide's, Amory, Jr.'s, and James's respective interests in such trust as follows:

Name	*Nature of Interest*
Adelaide	(1) grandaughter of Alanson B. Houghton, * * * and (3) contingent income beneficiary and contingent remainderman of (a) trust under Article Nineteenth, Paragraph I [i.e., Elisabeth's Trust] * * *
Amory Jr.,	(1) grandson of Alanson B. Houghton, * * * and (3) contingent income beneficiary and contingent remainderman of (a) trust under Article Nineteenth, Paragraph I [i.e., Elisabeth's Trust] * * *
James	(1) grandson of Alanson B. Houghton, * * * and (3) contingent income benefi-

3 The record reveals that the so-called "trustees" of Houghton Estates assumed the principal responsibility for the financial matters of the Houghton family's various trusts, which numbered close to 100. The record further indicates that a significant portion of the trusts' assets consisted of stock in the Corning Glass Works, now a publicly held corporation, but in earlier years a privately held corporation apparently controlled by Alanson B. Houghton and various members of his family.

> ciary and contingent remainderman of (a) trust under Article Nineteenth, Paragraph I [i.e., Elisabeth's Trust] * * *

On April 4, 1957, the Surrogate of Steuben County (hereinafter referred to as the Surrogate) issued a citation (hereinafter referred to as Elisabeth's citation) to all persons who had an interest in Elisabeth's trust. On the same date, the Surrogate also issued nine other citations with respect to each of the other nine testamentary trusts created under decedent's will. Elisabeth's citation clearly listed the names of each family member having an interest in her trust, including the names of Adelaide, Amory, Jr., and James, and provided, in pertinent part, as follows:

> and to all persons interested in the trust for the benefit of Elisabeth Houghton under the Last Will and Testament of Alanson B. Houghton, late of the City of Corning, Steuben County, New York, Deceased, SEND GREETING:
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> Upon the petition of Amory Houghton and Arthur A. Houghton, Jr. duly verified by said Amory Houghton on February 9, 1957 and by said Arthur A. Houghton, Jr. on March 1, 1957,
>
> You and each of you are hereby cited to show cause before the Surrogate's Court of the County of Steuben in the Surrogate's Office in the Village of Bath, New York on the 21 day of October, 1957 at 10:00 o'clock in the forenoon of that date why said Surrogate's Court should not (1) finally and judicially settle and allow as filed the first intermediate account dated December 31, 1954 of petitioners as trustees of a trust for the benefit of Elisabeth Houghton under Article Nineteenth, Paragraph I of the Last Will and Testament of Alanson B. Houghton, deceased, covering both principal and income from October 1, 1945, the date of first receipt of assets by petitioners as such trustees to and including December 31, 1954 * * *

On June 15, 1957, Harold V. Ritter (hereinafter Mr. Ritter) an attorney retained by the trustees of Elisabeth's Trust and the other 9 testamentary trusts created under the will, personally served Elisabeth's citation and the other 9 citations upon Adelaide, who was 33 years of age at such time. On the same date, Mr. Ritter also served those citations upon Cole Heyniger and Susan Heyniger, Adelaide's minor children, by handing copies of the 10 citations for each child to Adelaide.

On August 26, 1957, Bela C. Tifft (hereinafter Mr. Tifft) an attorney retained by the trustees of Elisabeth's Trust and the other 9 testamentary trusts created under Alanson B. Houghton's will, personally served Elisabeth's citation and the other 9 citations upon Amory, Jr., who was 31 years of age at such time. On the same date, Mr. Tifft also served those citations upon Amory Houghton III and Robert West Houghton, the minor children of Amory, Jr., by handing copies of the 10 citations for each child to Amory, Jr.

On April 4, 1957, Mr. Tifft served a copy of Elisabeth's citation and the other 9 citations upon James by handing a copy to his mother, Laura R. Houghton. On April 7, 1957, James became 21 years of age. On September 7, 1957, Edward B. Hoffman, an attorney retained by the trustees of Elisabeth's Trust and the other 9 testamentary trusts created under the will, personally served Elisabeth's citation and the other 9 citations upon James.

Elisabeth died without issue on March 2, 1974. The youngest of decedent's issue who was living at the time of Elisabeth's death and decedent's death was Laura Beer.[4] Thus, according to the terms of Elisabeth's Trust, Laura Beer's lifetime serves as the measuring life of such trust.

Elisabeth was survived by eight of decedent's grandchildren (other than Sidney Cole), including Adelaide, Amory, Jr., and James. Thus, Adelaide, Amory, Jr., and James, upon Elisabeth's death, each became entitled to receive one-eighth of the income of Elisabeth's Trust during their respective lives; and if any of them survive Laura Beer (i.e., the measuring life), he or

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4 Beer is the married name of Amory Houghton's daughter and decedent's granddaughter. She was born on Feb. 13, 1938.

she would receive not less than one-eighth of the corpus of such trust.[5]

Adelaide, Amory, Jr., and James each executed disclaimers with respect to their entire interests (i.e., income and corpus) in Elisabeth's Trust on May 15, 1974, June 6, 1974, and June 7, 1974, respectively. The disclaimers were unequivocal, valid under New York law, and stated that they were effective as of March 2, 1974. Adelaide's disclaimer was delivered to the trustees of Elisabeth's Trust on May 24, 1974; Amory, Jr.'s and James's disclaimers were delivered to the trustees of such trust on June 13, 1974. At the time that they made their disclaimers, Adelaide and James each had two children, and Amory, Jr., had four children. As a consequence of their disclaimers, each of their children received, per stirpes, the interest that their respective parents had in Elisabeth's Trust.[6]

On petitioner's U.S. gift tax returns for the calendar quarter ending June 30, 1974, petitioners notified respondents of the disclaimers executed by them or by their respective spouses, but reported that no taxable gifts were made during that quarter. In the notices of deficiency, respondent determined that Adelaide's, Amory, Jr.'s, and James's disclaimers of their respective interests in Elisabeth's Trust constituted taxable gifts of those interests, and determined deficiencies accordingly.[7]

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5 If Adelaide, Amory, Jr., or James did not survive Laura Beer, his or her share of the corpus of Elisabeth's Trust would pass, according to the terms of such trust, to his or her issue per stirpes.

6 Under the provisions of Elisabeth's Trust, Adelaide, Amory, Jr., and James each became entitled to a portion of the trust's income during the period between Elisabeth's death and the delivery of their disclaimers to the trustees. No income, however, was distributed to them during such period; instead, the income was accumulated on the books of the trust and an income distribution was made to the beneficiaries of the trust on Aug. 19, 1974.

7 In the notice of deficiency issued to Adelaide, respondent determined that her interest in Elisabeth's Trust had a value, as of the date of the disclaimer, of $1,098,809.31. In the notices of deficiency, separately issued to James and his wife, May K. Houghton, respondent determined that James's interest in Elisabeth's Trust had a value, as of the date of the disclaimer, of

Opinion

We must determine whether Adelaide's, Amory, Jr.'s, and James's disclaimers of their respective interests in Elisabeth's Trust, whereby such interests passed to their children, constituted transfers of property by gift subject to the gift tax. See secs. 2501 and 2511.

Adelaide, Amory, Jr., and James were contingent beneficiaries of Elisabeth's Trust when it was established upon the death of Alanson B. Houghton on September 16, 1941.[8] At that time, the vesting of both their income and principal interests depended upon, inter alia, Elisabeth's dying without issue. On March 2, 1974, Elisabeth died without issue and she was survived by, among others, Adelaide, Amory, Jr., and James. By surviving Elisabeth, Adelaide, Amory, Jr., and James each became entitled to a one-eighth interest in the net income from Elisabeth's Trust and, if any of them survive Laura Beer, the measuring life of the trust, then he or she will receive not less than a one-eighth interest in the trust corpus.[9] Shortly after

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$1,179,341.89. In the notices of deficiency, separately issued to Amory, Jr., and his wife, Ruth W. Houghton, respondent determined that Amory, Jr.'s interest in Elisabeth's Trust had a value as of the date of the disclaimer of $1,088,438,84. The parties have stipulated and moved the Court that in the event an adverse decision is issued with respect to any of the petitioners, such petitioner and the respondent each reserves the right to introduce evidence at a later time as to the value of such petitioner's gift. We granted this joint motion.

8 We have assumed that Adelaide's, Amory, Jr.'s, and James's interest in Elisabeth's Trust are properly characterized as contingent interests. Petitioners have characterized such interests as contingent and respondent has stated that he does not object to that characterization. While their interests may arguably be characterized as vested subject to divestiture, such a distinction is not one of substance for our purposes herein. See *Jewett v. Commissioner*, 455 U.S. 305, 308-09 n.5 (1982); *Helvering v. Hallock*, 309 U.S. 106, 117-118 (1940).

9 In the event that Adelaide, Jr., or James did not survive Elisabeth but had children living at the time of her death, then such children would take the income share of their deceased parent per stirpes. In the event that

Elisabeth's death, Adelaide, Amory, Jr., and James each executed disclaimers of their respective interests in Elisabeth's Trust. Their disclaimers were unequivocal, valid under New York law, and expressly provided that they were effective as of March 2, 1974. Consequently, Adelaide, Amory, Jr., and James have never received any income or principal from Elisabeth's Trust and their respective interests therein passed to their successors in interests, their children.

With respect to a transfer of a property interest by trust or otherwise to a beneficiary, the beneficiary's refusal to accept ownership of his property interest may constitute an indirect gift to his successor in interest subject to the gift tax. Section 25.2511(c), Gift Tax Regs., provides, in pertinent part, as follows:

> The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. * * * Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), *a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer.* The refusal must be unequivocable [sic] and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to

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Adelaide, Amory, Jr., or James survived Elisabeth but not Laura Beer, and had children living at the time of Laura Beer's death, then such children would take the corpus share of their deceased parent per stirpes.

> another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. * * * [Emphasis supplied.]

Thus, section 25.2511-1(c), Gift Tax Regs., provides that a beneficiary's refusal to accept an interest transferred to him in trust will not be subject to the gift tax provided that the beneficiary's disclaimers is unequivocal, effective under local law, and made "within a reasonable time after knowledge of the existence of the transfer."[10] Moreover, the issue of what constitutes a "reasonable time" period within which to disclaim is one of Federal law not controlled by State law concepts of "reasonable time." See *Jewett v. Commissioner*, 70 T.C. 430, 433-434 (1978), affd. 638 F.2d 93 (9th Cir. 1980), affd. 455 U.S. 305 (1982); *Fuller v. Commissioner*, 37 T.C. 147, 155 (1961).

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10 With respect to transfers, which create an interest in the person disclaiming, made after Dec. 31, 1976, see sec. 2518, added to the Code by sec. 2009(b), Tax Reform Act of 1976, Pub. L. 94-455,90 Stat. 1893, which provides in part:

(a) GENERAL RULE.—For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.

(b) QUALIFIED DISCLAIMER DEFINED.—For purposes of subsection (a), the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property but only if—

Prior to the Supreme Court's decision in *Jewett v. Commissioner*, 455 U.S. 305 (1982), affg. 638 F.2d 93 (9th Cir. 1980), affg. 70 T.C. 430 (1978), there was a conflict between the Courts of Appeals for the Eighth and Ninth circuits as to when, in the case of a remainder interest which is contingent or vested subject to divestiture at the time of its creation, the "transfer" referred to in section 25.2511-1(c), Gift Tax Regs., occurs. The conflict was whether the "transfer" occurs when the interest is created or at a later time when the interest either vests or becomes possessory. Naturally, the disclaiming beneficiary who sought to fall outside the reach of the gift tax argued that the "transfer" did not occur until his interest either vested or became possessory so that the "reasonable time" period for disclaiming would not begin to run until that time. Compare the Ninth Circuit's opinion in *Jewett v. Commissioner*, 638 F.2d 93 (9th Cir. 1980), with the Eighth Circuit's opinion in *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973).[11] In

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(1) such refusal is in writing,

(2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of—

(A) the day on which the transfer creating the interest in such person is made, or

(B) the day on which such person attains age 21,

(3) such person has not accepted the interest or any of its benefits, * * *

11 *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973), revg. 58 T.C. 352 (1972), involved a taxpayer who was a remainderman of a testamentary trust created by the will of his father, who died in 1944. The trust provided his mother with a life interest and, upon her death, the trust remainder was to be divided equally between the testator's two sons. In the event that either son predeceased his mother, the life tenant, the deceased son's share was to be distributed to the son's child per stirpes. The taxpayer disclaimed his remainder interest within 6 months following his mother's death, which was approximately 19 years after the trust was created. The taxpayer and the Government agreed that the taxpayer had a vested remainder in one-half of

Jewett v. Commissioner, 455 U.S. 305 (1982), the Supreme Court resolved the conflict between the two circuits by holding that the "transfer" occurs at the time the interest is created.

The instant cases were tried and intially briefed prior to the Supreme Court's decision in *Jewett v. Commissioner, supra*. Since Adelaide, Amory, Jr., and James all disclaimed their interests in Elisabeth's Trust approximately 33 years after those interests were created, but shortly after Elisabeth's death, petitioners devoted a large portion of their original and reply briefs to arguing that the "transfer" within the meaning of section 25.2511-1(c), Gift Tax Regs., did not occur until the date of Elisabeth's death. According to petitioners, a "transfer" could not have occurred at an earlier point in time because Adelaide's, Amory, Jr.'s, and James's respective remainder interests in Elisabeth's Trust were "wholly contingent up until the very moment of Elisabeth's death." Since the Supreme Court in *Jewett* decided the "transfer" issue contrary to the view expressed by petitioners in their briefs, we allowed the

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the trust subject to divestiture only if he should predecease the life beneficiary of the trust. On these facts, the Eighth Circuit held that the taxpayer had a reasonable time after the death of the life beneficiary within which to disclaim his remainder and thus not be subject to the gift tax.

Jewett v. Commissioner, 455 U.S. 305 (1982), affg. 638 F.2d 93 (9th Cir. 1980), affg. 70 T.C. 430 (1978), involved a taxpayer who held a remainder interest in a testamentary trust established under the will of his grandmother, who died in 1939. The trust provided the taxpayer's mother with a life interest and, upon her death, the taxpayer was entitled to a share of the trust remainder if he survived his mother; if the taxpayer did not survive his mother, his share would be distributed to his issue per stirpes. During 1972, when the taxpayer and his mother were 55 and 72 years of age, respectively, the taxpayer disclaimed his interest in the trust. Notwithstanding the fact that the taxpayer's interest at such time (i.e., during 1972) was subject to contingencies and had not yet become possessory, the Ninth Circuit held that the "transfer" within the meaning of sec. 25.2511-1(c), Gift Tax Regs., took place in 1939, when the taxpayer received a contingent remainder from his deceased grandmother's estate. Accordingly, the Ninth Circuit concluded that the taxpayer did not disclaim his interest within a reasonable period of time, and thus was subject to the gift tax.

parties to file supplemental briefs subsequent to that decision. Petitioners, in their supplemental brief, appear to concede the "transfer" argument advanced in their original and reply briefs. In any event, we conclude that the relevant "transfer" in the instant cases occurred on September 16, 1941, when Adelaide's, Amory, Jr.'s, and James's grandfather, Alanson B. Houghton, transferred assets to a testamentary trust for the primary benefit of Elisabeth (i.e., Elisabeth's Trust). *Jewett v. Commissioner, supra.*

Petitioners now devote all of their arguments to the claim that Adelaide, Amory, Jr., and James did not have "knowledge" within the meaning of section 25.2511-1(c), Gift Tax Regs., with respect to Elisabeth's Trust until late 1973 or 1974. Accordingly, Adelaide, Amory, Jr., and James contend that their disclaimers, made on May 15, 1974, June 6, 1974, and June 7, 1974, respectively, were executed within a reasonable time after they acquired "knowledge" and, therefore, their disclaimers did not constitute indirect taxable gifts to their children. Respondent, on the other hand, maintains that Adelaide, Amory, Jr., and James all had "knowledge of the existence of the transfer" within the meaning of section 25.2511-1(c), Gift Tax Regs., in 1957, when they were personally served with Elisabeth's citation. Consequently, respondent contends that their disclaimers, approximately 17 years after the personal service upon them of Elisabeth's citation, were not executed within a reasonable time and thus constitute taxable gifts. We agree with respondent.

Petitioners argue that Adelaide, Amory, Jr., and James did not have "knowledge of the existence of the transfer" within the meaning of section 25.2511-1(c), Gift Tax Regs., until shortly after Elisabeth's death on March 2, 1974. Petitioners contend that a taxpayer must have "active knowledge not merely as to the existence of the trust but also as to the nature and value of the trust property and * * * [his] specific interest * * * therein" before the reasonable time period within which to disclaim should begin to run. Petitioners, however, cite no

authority squarely in accord with their position.[12] Moreover, petitioners' position is contrary to the language of section 25.2511-(c), Gift Tax Regs., which only speaks to "knowledge of the existence of the transfer." We decline petitioners' attempt to have us interpret this regulation by imposing additional conditions as to the knowledge requirement when such conditions are in no way supported by the clear language of the regulation.

Furthermore, to the extent that Adelaide, Amory, Jr., and James desired "knowledge not merely as to the existence of the trust but also as to the nature and value of the trust property and * * * [their] specific interest * * * therein," there were at least two avenues open to them. First, they could have examined the original Will of Alanson B. Houghton, which was admitted to probate in the Surrogate's Court of the State of New York.[13] Second, they could have consulted actuaries, attorneys, or their family corporation, Houghton Estates, to help them obtain more specific information about the nature and value of their interests in Elisabeth's Trust. We found Adelaide, Amory, Jr., and James to be intelligent individuals, and their testimony establishes that they had access to, and

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12 In their supplemental brief, petitioners refer us to *Jewett v. Commissioner, supra*, and contend that therein the Supreme Court decided "the disclaimer of a remainder interest in a trust is subject to gift tax if it is not made within a reasonable time after the taxpayer has *actual knowledge of the specific terms of * * * [his] interest and of the nature and value of the trust property.*" (Emphasis added.) This quoted language, however, appears nowhere in the *Jewett* case. In *Jewett v. Commissioner, supra*, the Supreme Court very clearly stated that "*the narrow question presented* is whether the 'transfer' [referred to in sec. 25-2511-1(c), Gift Tax Regs.] * * * occurs when the interest is created or at a later time when the interest either vests or becomes possessory." (455 U.S. at 306; emphasis added.)

13 See N.Y. Surr. Ct. Proc. Act. (58A) secs. 2501, 2503 (Consol. 1967), which provides that every will admitted to probate shall be recorded at length by the clerk of the Surrogate's Court, and that all records of the court, other than those sealed, are open to inspection by any person at reasonable times. Petitioners have not alleged that the Will of Alanson B. Houghton was sealed and therefore unavailable for their inspection during 1957.

contact with, attorneys during 1957, when all of them were at least 21 years of age.[14]

Adelaide, Amory, Jr., and James were personally served Elisabeth's citation during 1957. The citation clearly listed the names of each family member having an interest in Elisabeth's trust, including the names of Adelaide, Amory, Jr., and James. In addition, the citation clearly stated that such persons were interested in "a trust for the benefit of Elisabeth Houghton under Article Nineteenth, Paragraph I of the Last Will and Testament of Alanson B. Houghton." Thus, although Elisabeth's citation did not give specifics as to the exact nature and value of Adelaide's, Amory, Jr.'s, and James's interests in Elisabeth's Trust, section 25.2511-1(c), Gift Tax Regs., simply does not require that a disclaiming beneficiary have such knowledge before the reasonable time period within which to disclaim begins to run. The regulation requires "knowledge as to the existence of the transfer," and we think that once a disclaiming individual has knowledge that some property interest has been transferred to him, it would frustrate the application of the gift tax to allow him to sit on that knowledge interminably, decide upon whether or not he wants to disclaim his interest by considering events occurring as much as 17 years later, and avoid the gift tax if he decides to disclaim the interest.

Moreover, our conclusion herein is also supported by the gift tax provisions in the Internal Revenue Code and applicable legislative history. Section 2501 imposes a tax on the transfer of property by gift by any individual. Section 2511(a) provides that the gift tax "shall apply whether the transfer is in trust or

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14 In this connection, we note that the personal service of Elisabeth's citation upon Adelaide, Amory, Jr., and James during 1957 was done by attorneys Harold Ritter, Bela C. Tifft, and Edward B. Hoffman, respectively, during 1957. Adelaide, Amory, Jr., and James all testified to the effect that they do not recall whether there was any discussion concerning Elisabeth's citation with the aforementioned attorneys when they were personally served such citation.

otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible." The Senate[15] and House[16] reports state:

> The terms "property," "transfer," "gift," and "indirectly," and used in the broadest and most comprehensive sense * * *
>
> The words "transfer * * * by gift" and "whether direct or indirect" are designed to cover and comprehend all transactions * * * whereby, and to the extent * * * that property or a property right is donatively passed to or conferred upon another, regardless of the means or the device employed in its accomplishment.

In short, this legislative history reflects a clear intent on the part of Congress to apply the gift tax "in the broadest and most comprehensive sense." The tax is clearly broad enough to encompass all disclaimers, as they are an indirect way to gift property. See *Jewett v. Commissioner, supra* at 310. Thus, while section 25.2511-1(c), Gift Tax Regs., provides for an exception to the general rule that disclaimers are indirect gifts subject to the gift tax, we do not think that an expansive reading of the exception (hereinafter referred to as the disclaimer exception) is consistent with the congressional intent underlying the gift tax. As the Supreme Court reaffirmed in *Jewett v. Commissioner*, 455 U.S. 305, 310 (1982), the purpose of the gift tax is to compensate for the avoidance of estate taxes through inter vivos gifts. See also *Estate of Sanford v. Commissioner*, 308 U.S. 39, 44 (1939). By making disclaimers, Adelaide, Amory, Jr., and James removed their respective interests in Elisabeth's Trust from their taxable estate and conferred a gratuitous benefit upon their children. While their actions were unequivocal and effective under New York law, petitioners should not be able to circumvent the gift tax when it is clear that Adelaide, Amory, Jr., and James were served

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15 S. Rept. 665, 72d Cong., 1st Sess. 39 (1932).

16 H. Rept. 708, 72d Cong., 1st Sess. 27, 28 (1932).

notice during 1957 that they had an interest in Elisabeth's Trust and did not disclaim their interests therein until 17 years later.[17]

By trying to impose more conditions to the knowledge requirements than section 25.2511-1(c), Gift Tax Regs., requires on its face, petitioners seek to expand the disclaimer exception contained therein to the point where such exception would practically swallow the general rule that disclaimers are indirect gifts subject to the gift tax.[18] In contrast, respondent's position, that the personal service of Elisabeth's citation constitutes "knowledge of the existence of the transfer" within the meaning of section 25.2511-1(c), Gift Tax Regs., is based upon an interpretation of the disclaimer exception contained therein which adheres to the clear language of the regulation and is perfectly consistent with Congress's clear intent that the gift tax be applied "in the broadest and most comprehensive sense."

In conclusion, we hold that Adelaide, Amory, Jr., and James made taxable gifts when they executed disclaimers of their respective interests in Elisabeth's Trust. Since the value of those gifts cannot be ascertained on the record before us,[19]

An appropriate order will be issued.

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17 We have found that Adelaide, Amory, Jr., and James each read Elisabeth's citation during 1957. While certain arguments advanced by petitioners in their original and supplemental briefs may be read to imply otherwise, we find that the record in these cases does not support a finding that Adelaide, Amory, Jr., and James failed to read Elisabeth's citation during 1957. The testimony of Adelaide, Amory, Jr., and James with respect to their recollection of the time when they were served with Elisabeth's citation was vague and uncertain. To the extent that petitioners have argued to the contrary they have simply failed to meet their burden of proof. See Rule 142(a), Tax Court Rules of Practice and Procedure.

18 While we recognize that the Supreme Court's holding in *Jewett v. Commissioner, supra*, does not interpret the term "knowledge" contained in sec. 25-2511-1(c), Gift Tax Regs., we think that, on the facts of the cases before us, petitioners' position represents an attempt to make an end run on rationale of that case by devising a strained and unsupported interpretation of that term.

19 See note 7 *supra*.

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No. 86-1931

In the Supreme Court of the United States

OCTOBER TERM, 1987

ADELAIDE C. GRISWOLD, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners contend that their execution of disclaimers of their interests in a trust, which resulted in the transfer of those interests from petitioners to their children, was not untimely as the courts below held, and therefore did not constitute taxable gifts of those interests by petitioners to their children.[1]

1. a. Petitioners' grandfather, Alanson B. Houghton ("the settlor") died testate on September 16, 1941. His will established ten trusts, one of which was for the primary benefit of his daughter Elisabeth, who was petitioners' aunt. Under the terms of this trust, the income was payable to Elisabeth for life; upon her death, the income was payable to her issue or, if she had none, to eight

[1] The trust interests at issue here were conferred upon petitioners Adelaide C. Griswold, Amory Houghton, Jr., and James R. Houghton. Petitioners Ruth W. Houghton (Amory's wife) and May K. Houghton (James's wife) are parties to this case solely by virtue of having filed consents that any gifts by their husbands during 1974 be considered as having been made by both husband and wife. For convenience, we will refer to Adelaide Griswold, Amory Houghton, Jr., and James Houghton collectively as "petitioners."

named grandchildren of the settlor, including petitioners. The trust instrument further provided that the trust would terminate upon the death of the youngest of the settlor's issue (the "measuring life") who was alive both at the time of the settlor's death and at the time of Elisabeth's death. At that time the corpus would be distributed to Elisabeth's issue or, if she had none, to the settlor's above-mentioned eight grandchildren. Pet. App. A6-A8.

In March 1957, the trustees of Elisabeth's trust petitioned the New York Surrogate's Court for a judicial settlement of the trust's first intermediate accounting.[2] In the petition the trustees listed petitioners as each being a "contingent income beneficiary and contingent remainderman of * * * [Elisabeth's Trust]" (Pet. App. A8). In April 1957, the Surrogate issued citations to all persons having an interest in Elisabeth's trust, directing them to show cause at a certain time and place why the first intermediate accounting should not be allowed. The citations were directed to petitioners, among others, and "all persons interested in the trust for the benefit of Elisabeth Houghton under the Last Will and Testament of Alanson B. Houghton * * *" (*id.* at A9). Copies of the citation were personally served, by attorneys retained by the trustees, on petitioners (*id.* at A10). The Tax Court specifically found (*id.* at A21 n.17) that petitioners each had read the citation in 1957.

Elisabeth died without issue on March 2, 1974. She was survived by petitioners and the five other named grandchildren. Thus, under the terms of the trust, each grandchild, including petitioners, thereupon became entitled to receive one-eighth of the trust's income for life, and, if he

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[2] The two trustees were Amory Houghton and Arthur A. Houghton. Amory Houghton was the father of petitioners Amory, Jr., and James, and the uncle of petitioner Adelaide Griswold. Arthur Houghton was petitioners' cousin.

or she were to survive the "measuring life," one-eighth of the trust's corpus (see Pet. App. A10-A11). During the next three months, petitioners each executed a disclaimer, valid under state law, with respect to his or her income and remainder interests in Elisabeth's trust. As a result, petitioners' children received the interests that petitioners themselves would have received under the terms of Elisabeth's trust. On audit, the Commissioner determined that petitioners' disclaiming of their respective interests in Elisabeth's trust constituted taxable gifts of those interests to their children, and accordingly he determined gift tax deficiencies (*id.* at A11).[3]

b. Petitioners challenged the proposed deficiencies in the Tax Court, contending that their disclaimers did not in fact constitute taxable gifts. They relied on Section 25.2511-1(c) of the Treasury Regulations on Gift Tax, which provides in pertinent part that "a refusal to accept ownership [of property transferred from a decedent] does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer." They contended that they did not have "knowledge of the existence of the transfer" (*i.e.*, of the settlor's creation of their interests in Elisabeth's trust through his 1941 will) until Elisabeth's death in 1974 and therefore that the disclaimers they made shortly thereafter were not taxable. In support of this contention, petitioners argued that the applicable phrase in the regulations contemplated the taxpayer's " 'active knowledge not merely as to the existence of the trust but also as to the nature and value of the trust property and * * * [his] specific interest * * * therein' " (Pet. App. A17).[4]

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[3] The interests were each determined to have a value in excess of $1 million (Pet. App. A11 n.7).

[4] Petitioners' primary contention in the Tax Court originally was that the "transfer" of the interests to them did not occur when the trust was created in 1941, but rather occurred upon Elisabeth's death in 1974. After the trial in the Tax Court, this Court decided *Jewett* v. *Commis-*

The Tax Court sustained the deficiencies (Pet. App. A4-A21; 81 T.C. 141). It found that petitioners had acquired knowledge of the existence of their interests in Elisabeth's trust no later than 1957, when they were served with the Surrogate's Court citations. The court explained that these citations "clearly listed the names of each family member having an interest in Elisabeth's trust, including the names of Adelaide, Amory, Jr., and James," and "clearly stated that such persons were interested in 'a trust for the benefit of Elisabeth Houghton under * * * the Last Will and Testament of Alanson B. Houghton' " (Pet. App. A19). The court specifically found that "Adelaide, Amory, Jr., and James each read Elisabeth's citations during 1957" (Pet. App. A21 n.17). And the court rejected petitioners' contention that the disclaimer period under the regulation is not triggered unless the taxpayer knows, not only of the existence of his interest in a trust, but also its value (*id.* at A17-A20). Since petitioners had first acquired knowledge of the existence of their interests no later than 1957, the court found that their 1974 disclaimers were not made within a "reasonable time" thereafter under Treas. Reg. § 25.2511-1(c). Hence, they were taxable gifts.

The court of appeals affirmed in an unpublished opinion (Pet. App. A1-A3; 812 F.2d 172 (Table)). The court held that the Tax Court did not err in holding that "petitioners had not sustained their burden of proving that they had not read the [Surrogate's Court] citations in 1957" (*id.* at A2). The court also upheld the Tax Court's "implicit finding that the 1957 citations were sufficient to inform petitioners that they had interests in the trusts" (*ibid.*). The court of appeals accordingly concluded that, because there was "no clear error in the Tax Court's findings as to peti-

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sioner, 455 U.S. 305 (1982), which clearly established that the "transfer" here occurred in 1941. Petitioners then focused in a supplemental brief on the argument that they lacked "knowledge" of their interests before 1974. See Pet. App. A16-A17.

tioners' actual knowledge in 1957 that they had interests in the trusts, there is no basis for overturning its conclusion that the 1974 disclaimers were not made within a reasonable time" (Pet. App. A3).

2. Petitioners contend (Pet. 7-14) that the lower courts erred in finding that petitioners had knowledge in 1957 of their interests in Elisabeth's trust. This factual contention plainly does not merit review by this Court. It is axiomatic that, absent the most exceptional circumstances, this Court will not disturb a factual finding concurred in by both lower courts. See, *e.g.*, *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967). There is no reason to deviate from that practice here. Moreover, the decision below is unpublished, and it is not alleged to conflict with a decision of any other court.[5]

Petitioners repeatedly state (Pet. 7, 8, 10, 13) that the decision below was incorrect in construing the term "knowledge" in the applicable regulation to encompass "constructive knowledge," when the term should be restricted to "actual knowledge." But this contention simply mischaracterizes the court of appeals' opinion. The court of appeals stated in the clearest language imaginable that it found "no clear error in the Tax Court's findings as to petitioners' *actual knowledge* in 1957 that they had interests in the trusts" (Pet. App. A3 (emphasis added)). In the same vein, petitioners assert (Pet. 8-9) that both courts below erected a "presumption" that "receipt of the citations [in 1957] constitute[d] actual knowledge of their contents." Petitioners again ignore the fact that the Tax Court (in a footnote to the passage that they quote) "found that

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[5] In addition, as petitioners acknowledge (Pet. 11), the question they seek to present is of diminishing future importance. Because of a statutory change made by the Tax Reform Act of 1976, Pub. L. No. 94-455, § 2009(b)(1) and (e)(2), 90 Stat. 1893, the regulation at issue here has no application to trust interests created after December 31, 1976.

[petitioners] each *read* Elisabeth's citation during 1957" (Pet. App. A21 n.17 (emphasis added)). The court of appeals upheld that factual finding (*id.* at A2-A3). Thus, it is clear that neither court relied upon a presumption such as petitioners describe. In sum, the legal issues that petitioners discuss simply are not presented in this case. Rather, this case turns on a factual finding concurred in by both lower courts—one that turned in part on the trial judge's assessment of the testimony given before him (see Pet. App. A21 n.17). The case presents no legal issue for this Court to review.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

AUGUST 1987

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[6] We note that we do not necessarily agree with petitioners' assertion that the Regulation must be interpreted to require "actual" knowledge, rather than "constructive" knowledge. Such an assertion is particularly questionable in a case like this, where responsibility for the supervision of petitioners' family trusts (including the trust at issue here) was delegated to a family-run corporation (see Pet. App. A8). But this issue simply is not presented here.

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